160 U.S. 268

TRANSCRIPT OF RECORD.

160-268

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 719.

GEORGE S. MOORE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

FILED AUGUST 27, 1895.

(16,009.)

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1 UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama, May Term, A. D. 1895.

THE UNITED STATES, Plaintiff, *versus* GEORGE S. MOORE, Defendant.	Case No. 1105. Indictment under Sections 4046, 5456, 5467, and the Act of March 3, 1875. Charge, Embezzlement.

Indictment.

District Court of the United States for the Southern District of Alabama, November Term, A. D. 1893.

The grand jurors of the United States, chosen, selected, and sworn for the southern district of Alabama, upon their oaths do find and present that on the eighteenth day of May, in the year of our Lord one thousand eight hundred and ninety-two, within said district, at Mobile, Alabama, and before the finding of this indictment George S. Moore did feloniously take and carry away, steal, and purloin certain property of the United States, to wit, money, a description of which is unknown to the grand jury, which money amounted to the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59) and was of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59)—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second count.

The grand jurors aforesaid upon their oaths aforesaid do further find and present that George S. Moore, late of the district
2 aforesaid, heretofore, to wit, on the eighteenth day of May, eighteen hundred and ninety-two, and before the finding of this indictment and within said southern district, in the city of Mobile, in the State of Alabama, he, said George S. Moore, being then and there an assistant or clerk or employé of the postal money-order office and postal-note office of the United States at Mobile, Alabama, did convert to his own use the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars, the property of the United States, of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), the same being money-order funds of the United States—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States—

Third count.

The grand jurors aforesaid upon their oaths aforesaid do further find and present that George S. Moore, late of the district aforesaid, heretofore, to wit, on the eighteenth day of May, eighteen hundred

and ninety-two, and before the finding of this indictment and within said southern district and in the city of Mobile, in the State of Alabama, did feloniously take and carry away the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59) in money, the personal property of the United States, of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), a description of which money is unknown to the grand jury—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Fourth count.

The grand jurors aforesaid upon their oaths aforesaid do further find and present that George S. Moore, late of the district aforesaid, heretofore, to wit, on the eighteenth day of May, eighteen hundred and ninety-two, and before the finding of this indictment and within said southern district, in the city of Mobile, in the State of
3 Alabama, he, the said George S. Moore, being then and there an assistant clerk or employé in or connected with the business or operations of the United States post-office in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), money of the United States, of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), the said money being the personal property of the United States—

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

JOS. N. MILLER,
U. S. Attorney, Sou. Dist. Alabama.

Law: R. S., 5456, 5467, & act Mar. 3, 1875, & R. S., 4046.

(Endorsed:) No. 1105. U. S. district court, sou. dist. Alabama, Nov. term, 1893. United States *vs.* George S. Moore. A true bill. W. H. Johnston, foreman U. S. grand jury. Filed in open court Dec. 5th, 1893. Rich'd Jones, clerk.

JUNE 6TH, 1895.

We, the jury, find the defendant guilty as charged in the fourth count of the indictment and assess a fine against him of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), and we find him not guilty as to the other counts.

JNO. S. HOLMES, *Foreman.*

UNITED STATES *vs.* GEORGE S. MOORE. } 1105. Defendant's Demurrers to the Indictment.

The defendant demurs to the indictment exhibited against him in the above-entitled cause and to each count thereof, and assigns the following causes of demurrer:

First. Because there is a misjoinder of offenses charged in the several counts of the indictment.

4 Second. The defendant demurs to the first count of said infictment, and for cause of said demurrer assigns the following:

1st. Because said first count fails to allege that the property charged to have been stolen was of value.

Third. The defendant demurs to the first and third counts of said indictment, and for causes of demurrer assigns the following:

1st. Because said counts are vague, indefinite, and uncertain and fail to describe with reasonable certainty the property or money alleged to have been stolen.

2nd. Because said counts fail to describe the money alleged to have been stolen and fail to allege that it was lawful money of the United States.

Fourth. The defendant demurs to the second and fourth counts of said indictment, and for causes of demurrer assigns the following:

1st. Said counts charge no criminal offense.

2nd. Said counts fail to allege that said money or property was feloniously or fraudulently converted and charge no criminal intent.

3rd. Said counts fail to describe with reasonable certainty the money or property alleged to have been converted or embezzled by the defendant.

4th. Said counts fail to allege that the money or property alleged to have been converted or embezzled was in the possession of the defendant.

5th. Said counts fail to allege that the money or property alleged to have been embezzled or converted was in the possesion or came into the possession of the defendant by reason of his office or agency or employment in the post-office or the postal-note office or the postal money-order office at Mobile, Alabama.

6th. Said counts fail to allege that defendant did not pay
5 the sum of money or deliver the property alleged to have been embezzled or converted upon demand, and that defendant was not authorized to retain the same on account of salary or compensation for his said services as said clerk in said post-office.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Defendant.

Filed in open court June 3rd, 1895.

RICHD JONES, *Clerk.*

UNITED STATES
vs.
GEORGE S. MOORE. } 1105. Defendant's Supplemental Demurrer to the Indictment.

Comes defendant and demurs to the second and fourth counts of said indictment, and assigns the following additional causes of demurrer:

First. Because said counts fail to allege with certainty the office or employment of defendant.

Second. Because said counts fail to allege with reasonable certainty the capacity in which defendant was employed, the office he held in connection with post-office, the postal money-order office, or the postal-note office at Mobile, Alabama.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Defendant.

Filed in open court June 3rd, 1895.

RICH'D JONES, *Clerk.*

6 *Order on Demurrers.*

TUESDAY MORNING, *June the 4th*, A. D. 1895.

Present: Honorable Harry T. Toulmin, judge presiding.

UNITED STATES } 1105. Indictment under Secs. 4046, 5456, &
vs. } 5467, R. S., and the Act of March 3rd, 1875.
GEORGE S. MOORE. } Charged with Embezzlement.

This cause having been submitted on the defendant's demurrer and supplemental demurrer to the indictment, and the same having been duly considered by the court—

It is now ordered by the court that the said demurrers as to the second count of the indictment be, and the same are hereby, sustained, and that said demurrers as to the 1st, 3rd, and 4th counts of the indictment be, and the same are hereby, overruled.

Order of Arraignment, Plea, and Jury Panel.

UNITED STATES } 1105. Indictment under Sec. 4046, 5456,
vs. } 5467, R. S., and Act of March 3, 1875.
GEORGE S. MOORE. } Charge, Embezzlement.

This day comes the United States, by its attorney, Jos. N. Miller, Esqr., and also comes the defendant, in his own proper person and by his attorneys, and, being arraigned, pleads not guilty.

Thereupon to try the issue joined comes a jury of good and lawful men, to wit, Gaston J. Robertson, John Battiste, John L. Steiner, Alex. Strouse, Geo. D. Walker, Henry J. Krudop, Henry Parsons, R. T. Thomas (C.), S. A. Lose, Chas. Spatz, Jno. S. Holmes, Thos. S. Wall, who being duly elected, tried, and sworn, the trial of said cause was proceeded with.

Verdict of the Jury and Order Suspending Sentence.

FRIDAY MORNING, *June the 7th, A. D.* 1895.

Present: Honorable Harry T. Toulmin, judge presiding.

7 UNITED STATES *vs.* GEORGE S. MOORE. } 1105. Indictment under Secs. 4046, 5456, 5467, R. S., and the Act of March 3, 1875. Charge, Embezzlement.

And now comes the jury and upon their oaths do say:

"We, the jury, find the defendant guilty as charged in the fourth count of the indictment and assess a fine against him of *of* sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1,652.59), and we find him not guilty as to the other counts.

"June 6th, 1895.

"(Signed) JNO. S. HOLMES, *Foreman.*"

It is ordered by the court that sentence be suspended until a later day of the present term of court and said defendant be admitted to bail in the sum of $3,000.00 for his appearance before court on Monday, June 10th, 1895, and from day to day and term to term thereafter until duly discharged by law, and in default of said bail to be committed to jail to await the sentence of the court.

UNITED STATES *vs.* GEORGE S. MOORE. } 1105. Defendant's Motion for a New Trial.

Comes the defendant and moves the court to set aside the verdict in this cause and grant defendant a new trial, and for cause of said motion assigns the following:

First. The verdict is contrary to the law and the evidence.

Second. The verdict is contrary to the charge of the court.

Third. The court erred in permitting the United States to prove the embezzlement or conversion of money-order funds.

Fourth. The court erred in charging the jury in the event of a verdict of guilty under the fourth count of the indictment to assess a fine against the defendant equal to the value of the amount embezzled.

8 Fifth. The court erred in refusing to give the charges requested by the defendant, excluding from the consideration of the jury the evidence relating to the conversion of money-order funds and the key-deposit fund.

Sixth. The court erred in refusing the general affirmative charge requested by the defendant, because there was no evidence of the value of the property converted and no basis for the assessment of the fine by the jury.

Seventh. The fine assessed by the verdict of the jury is excessive and not supported by the evidence.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Defendant.

Filed June 10th, 1895.

RICH'D JONES, *Clerk.*

WEDNESDAY MORNING, *June 12th, A. D.* 1895.

Present: Hon. Harry T. Toulmin, judge.

UNITED STATES *vs.* GEORGE S. MOORE. } 1105. Order Denying Motion for a New Trial.

This cause coming on to be heard upon the defendant's motion for a new trial, and the same having been fully argued by the attorneys *pro* and *con.*, and the court having duly considered the same, it is now ordered that the said motion be, and the same is hereby, denied.

UNITED STATES *vs.* GEORGE S. MOORE. } 1105. Defendant's Motion in Arrest of Judgment.

Comes the defendant in the above-entitled cause after conviction and before sentence and moves the court to arrest judgment therein, and for grounds of said motion assigns the following, to wit:

1st. Because the fourth count of the indictment under which the defendant was found guilty charges no criminal offense under the laws of the United States.

2nd. Because said fourth count fails to aver that said money charged to have been embezzled was feloniously or fraudulently embezzled, and hence charges no criminal intent.

3rd. Because said fourth count is vague, indefinite, and uncertain and fails to aver that said George S. Moore was an officer of the United States, or was an assistant to an officer of the United States, or was an assistant to P. D. Barker, postmaster at Mobile, Alabama.

4th. Because said fourth count fails to aver whether said George S. Moore was an assistant to the postmaster at Mobile or clerk or employé in or connected with the business or operations of the United States post-office in the city of Mobile, State of Alabama, in some other capacity, and is hence vague and uncertain in not specially naming the capacity in which said George S. Moore was employed in said post-office.

5th. Because said fourth count fails to aver that the said money charged to have been embezzled or wrongfully converted to the use of the defendant, said George S. Moore, came into his possession or under his control in the execution of such office or employment or under color or claim of authority as such officer or assistant to such officer.

6th. Because said fourth count fails to allege that the defendant, said George S. Moore, did not pay the money alleged to have been due the United States upon lawful demand for the same.

7th. Because said fourth count fails to aver that the defendant, said George S. Moore, was not authorized to retain the said money on account of salary or compensation for his service in said post-office.

8th. Because said fourth count of said indictment fails to aver the kind of money alleged to have been embezzled or wrongfully converted by the defendant, said George S. Moore, and fails to aver the source from which said money was derived, and fails to aver whether said money so alleged to have been embezzled or wrongfully converted was money-order funds, postal funds, or funds arising from deposits to secure return of keys or the delivery of special-request envelopes.

10 9th. Because said fourth count fails to aver that said George S. Moore was assistant postmaster in the post-office at Mobile, Alabama.

10th. Because said fourth count fails to aver that the money alleged to have been embezzled or wrongfully converted to the use of the defendant, said George S. Moore, was money-order funds of the United States.

11th. Because the said fourth count of said indictment fails to aver that the United States post-office in the city of Mobile, in the State of Alabama, was a money-order office.

12th. Because said fourth count fails to aver that the defendant, said George S. Moore, was in temporary custody of money derived from sources which by law were part of the postal revenue and wilfully neglected to deposit the same in the Treasury of the United States or in some other depository authorized to receive the same.

13th. Because said fourth count fails to aver that the defendant, said George S. Moore, was intrusted by law with the sale of postage stamps and stamped envelopes, and refused or neglected to account for the same, and unlawfully disposed of the same.

14th. Because said fourth count fails to aver that the defendant, said George S. Moore, received public money which he was not authorized to retain as salary, and failed to render his accounts for the same as provided by law.

15th. Because said fourth count fails to aver that the defendant, said George S. Moore, embezzled or wrongfully converted to his own use money which came into his possession or under his control in the execution of his office or employment from persons or parties other than the United States.

16th. Because said fourth count fails to aver that the defendant, said George S. Moore, was charged with the safe keeping of

11 moneys of the United States and failed to deposit the same when required to do so by the Postmaster General or any agent of the Postmaster General.

17th. Because said fourth count fails to aver that the defendant, said George S. Moore, was charged by an act of Congress with the safe keeping of postal revenues, and failed to keep said revenues safely.

18th. Because said fourth count fails to aver that the defendant,

said George S. Moore, was a receiver or depositary of postal revenues.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Defendant.

Filed June 10th, 1895.

RICH'D JONES, *Clerk.*

Order Denying Motion in Arrest of Judgment.

SATURDAY MORNING, *June 22nd, A. D.* 1895.

Present: Honorable Harry T. Toulmin, judge presiding.

UNITED STATES } 1105. Indictment under Secs. 4046, 5456, 5467,
vs. and Act of March 3rd, 1875. Charge, Em-
GEORGE S. MOORE. } bezzlement.

This cause coming on to be heard upon the defendant's motion in arrest of judgment, and the same having been fully argued by the attorneys *pro* and *con.*, and the court having duly considered the same—

It is now ordered that said motion be, and the same is hereby, denied.

12 *Order of Sentence.*

THURSDAY MORNING, *June the 27th, A. D.* 1895.

Present: Honorable Harry T. Toulmin, judge presiding.

UNITED STATES } 1105. Indictment under Secs. 4046, 5456,
vs. 5467, and the Act of March 3rd, 1875.
GEORGE S. MOORE. } Charged with Embezzlement.

The defendant being this day arraigned for sentence, and being asked by the court if he had anything to say why sentence should not be pronounced, and saying nothing—

It is now ordered by the court that the defendant, George S. Moore, be imprisoned for the period of two and one-half years at hard labor in the Kings county penitentiary at Brooklyn, in the State of New York.

UNITED STATES } 1105. Defendant's Assignment of Errors.
vs.
GEORGE S. MOORE. }

In the matter of conviction and sentence of George S. Moore in said court comes George S. Moore, by his attorneys, and says that there are manifest errors in the judgment of said court in the above-named cause, and as error assigns the following:

First. The court erred in overruling the demurrers to the indictment.

Second. The court erred in overruling the demurrers to the fourth count of the indictment.

Third. The court erred in overruling the motion of defendant to exclude the testimony of the witness Hancock.

Fourth. The court erred in allowing the introduction in evidence of the paper purporting to be a list of persons ordering special-request envelopes, and paying in money for the same, prepared by the postmaster.

13 Fifth. The court erred in allowing the introduction of the draft or check during the examination of the witness Irwin.

Sixth. The court erred in overruling the motion of the defendant to exclude the testimony of the witness Irwin.

Seventh. The court erred in allowing the witness P. D. Barker to explain the paper to the jury previously admitted in evidence.

Eighth. The court erred in allowing the question to the witness Barker as to whether stamped envelopes had been taken out of the post-office by defendant.

Ninth. The court erred in overruling the motion of the defendant to exclude the testimony of the witness Thrower.

Tenth. The court erred in overruling the motion of defendant to exclude the testimony of the witness Cox relating to the taking of stamped envelopes.

Eleventh. The court erred in overruling the motion of the defendant to exclude the testimony of the witness Merritt.

Twelfth. The court erred in overruling the motion of the defendant to exclude the testimony of the witness James Smith, Jr.

Thirteenth. The court erred in its general charge to the jury.

Fourteenth. The court erred in the following portions of its general charge, viz: "If the postmaster entrusted the public funds to the defendant without reference to his position and he converted them, then he would be guilty of larceny."

"If the jury find the defendant guilty under the fourth count of the indictment, they will assess a fine equal to the value of the money which was embezzled or converted." "When money has been paid to a post-office upon an order for special-request envelopes it becomes the money of the United States."

14 Fifteenth. The court erred in refusing to give charges numbered one, three, four, six, seven, eight, ten, and twelve requested in writing by the defendant.

Sixteenth. The court erred in denying the motion in arrest of judgement.

Seventeenth. The court erred in its final judgment in said cause.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Defendant.

Filed June 27th, 1895.

RICH'D JONES, *Clerk.*

UNITED STATES
vs.
GEORGE S. MOORE. } No. 1105. Petition for a Writ of Error.

To the honorable United States district court for the southern district of Alabama:

Your petitioner, George S. Moore, respectfully shows unto your honor that the above-entitled cause came on to be heard on the 4th day of June, 1895, in the United States district court for the southern district of Alabama; that your petitioner filed certain demurrers to the indictment in said cause, which were duly argued and submitted to the Honorable Harry T. Toulmin, judge presiding in said court, and which said several demurrers, except to the second count of said indictment, were duly overruled, and said cause was then tried, and during the trial of the same your petitioner made several objections to questions asked by the United States attorney *to* the witnesses being examined against petitioner; and thereupon petitioner, through his attorneys, propounded questions to wit-
15 nesses being examined both for and against him.

The court overruled the objections of petitioner to the questions asked by the United States attorney, and petitioner then and there reserved exceptions to the ruling of said court, and your petitioner therefore shows that during the trial of said cause petitioner reserved several exceptions to the ruling of said court in allowing certain evidence to go to the jury and overruling motion of petitioner to exclude it therefrom.

Your petitioner further shows that on the 7th day of June, 1895, the jury returned a verdict of guilty and assed a fine against petitioner as $1,652.59. On the 10th day of June, 1895, your petitioner made a motion in arrest of judgment in said cause, which motion was on the 22nd day of June, 1895, denied by the court, and on the 27th day of June, 1895, the court pronounced sentence upon petitioner.

Petitioner shows that there has been manifest injury done him in the trial and sentence in said cause.

Wherefore petitioner prays to be allowed a writ of error to the United States Supreme Court from and to supersede the judgem-nt made and rendered by the said honorable United States district court for the southern district of Alabama on the 27th day of June, 1895, sentencing petitioner, and that this honorable court will make all necessary orders in the premises and cause citation in due form to issue.

McINTOSH & RICH AND
M. D. WICKERSHAM,
Attorneys for Petitioner.

Filed June 27th, 1895.

RICH'D JONES, *Clerk.*

16 *Order Granting Defendant Writ of Error and Allowing Until July 15th to Present His Bill of Exceptions and Allowing Him Bail in the Sum of $2,000.00 Pending said Writ.*

THURSDAY MORNING, *June the 27th, A. D.* 1895.

Present: The Honorable Harry T. Toulmin, judge presiding.

UNITED STATES
vs. } 1105.
GEORGE S. MOORE.

It appearing to the court that an assignment of errors having been filed according to law and the rules of court in the above-entitled cause, and a writ of error to the Supreme Court of the United States having been prayed for, it is ordered that the writ of error be granted and the said defendant be allowed to the 15th day of July proximo, 1895, to prepare and present his bill of exceptions for a writ of error; and it is further ordered that when a writ of error is sued out the execution of the sentence be suspended pending such writ of error and the defendant be admitted to bail in the sum of two thousand dollars ($2,000.00) pending said writ of error.

Order Granting Defendant Additional Time within which to Present His Bill of Exceptions.

MONDAY MORNING, *July the 15th, A. D.* 1895.

Present: The Honorable Harry T. Toulmin, judge presiding.

UNITED STATES
vs. } 1105. Indictment Charging Embezzlement.
GEORGE S. MOORE.

Comes the defendant, through his attorneys, and, upon good cause being shown to the court, it is ordered that the said defendant be, and he is hereby, granted five (5) days' additional time from
17 this date within which to prepare and present his bill of exceptions to the court.

Defendant's Bill of Exceptions.

UNITED STATES
vs. } No. 1105.
GEORGE S. MOORE.

Be it remembered that at the May term, 1895, of said court, the above-entitled cause coming on to be heard, the following proceedings were had: The defendant was arraigned, and, the indictment being read to him, he pleaded not guilty.

The United States then called JOHN HANCOCK, who testified that he was, in 1892, in the service of the United States as a post-office

inspector; that the defendant was assistant postmaster in the post-office at Mobile, Alabama; that he (witness) came to Mobile, Alabama, on the 17th day of May, 1892, and on the 18th day of May, 1892, commenced an examination of the post-office at Mobile, and made a thorough investigation of the same and of the post-office records, including the books and accounts kept by the defendant as an assistant in the post-office; that he concluded said examination on the 27th day of May, 1892; that he found said office short the sum of sixteen hundred and fifty-two dollars and fifty-nine cents, made up of the following particular funds, viz.: Postal funds, $381.59; money-order funds, $400; special-request envelope fund, $714.00; that this special-request envelope fund was a thing that witness took very little hand in, as the postmaster did that. The postmaster canvassed the town to find who had paid money for special-request envelopes and given orders for them, and it was found there was $714 shortage in that account. Witness had no personal knowledge of the steps taken in this matter and knew only what
the postmaster had told him; that there was a shortage in
18 what is known as the key-deposit fund of $157, making a total of sixteen hundred and fifty and $\frac{59}{100}$ dollars. Witness had no personal knowledge of the causes of said deficit other than such as he gained from an inspection of the post-office, the stock, the books, and records referred to and from talking with persons connected with the office; that the safe was opened and the money in the safe counted in the absence of the defendant. Witness further testified that the information he received as to the amount of money received at the post-office for special-request envelopes was obtained from a list of persons furnished to him by the postmaster, which persons had stated to the postmaster that they had paid in money for special-request envelopes. The amount of all said shortages was paid by the father and father-in-law of the defendant after the inspection and discovery of the shortages; that no demand was made upon the defendant personally that witness knew of, and that defendant was reported to be too ill to be visited at that time.

Witness also testified that there was another shortage alleged to be chargeable to another employé of the post-office of about eighty dollars, which was also paid, but not by the defendant or any one for him. Witness while making the inspection of the office did not exclude others, and had not the entire control of the office; that the business of the office went on in its regular way during the inspection of the office, and that he did not see the defendant at any time during the inspection.

The defendant moved to exclude the testimony of the witness and all that part relating to the shortages on the part of the defendant because it is hearsay and not the best evidence and because the information on which it is based was not derived from the defendant
or from other sources when the defendant was present.
19 Said motion was made after the defendant had fully and in great detail cross-examined the witness and had brought out with particularity many of the matters testified to. The court overruled the motion, and the defendant excepted.

The United States then introduced L. F. IRWIN, who testified that he had been assistant postmaster as predecessor of the defendant at Mobile for four years and had large experience in running said office, and after the defendant left the office, in May, 1892, he had been assistant postmaster in said office since to the present time, and that he was now assistant postmaster in said office; that at the request of the postmaster he assisted John Hancock, the post-office inspector, in making the inspection of the post-office at Mobile. The result of the inspection was that he, together with the inspector, found that the office was short the sum of sixteen hundred and fifty-two dollars and fifty-nine cents, made up as is particularly set out in the testimony of the witness John Hancock. Witness had no connection with the post-office at the time and no personal knowledge of any of the transactions that led up to the inspection, his information being confined entirely to that derived from the books and records of the office and what other persons connected therewith had told him, but that all shortages had been paid in full.

Witness further testified that, pending the inspection of the office, he had gone to see the defendant and had shown to him a list of persons who claimed to have paid in money for special-request envelopes, which list was in the handwriting of the postmaster, Barker, and which had been furnished him by said postmaster; that defendant made no comment upon or statement relative to the list of persons and amounts of money alleged to have been paid in for special-request envelopes when said list was shown to him, except as to one item in said list, saying that that item was incorrect in amount.

The United States then offered said list in evidence, which is in words and figures as follows:

McIntosh & Rich,	500 m sample,	Dec. 22, '91	11 00
P. O. box 211 (H. Tacon, M. & O.),	1,000 No. 7, dd. blue,	M'ch 2, '92	21 60
Pillans, Torrey & Hanaw,	500 No. 5, 2 quality, 2 cts.,	May 5, '92	10 80
Mobile Phosphate & Chemical Co.,	1,000 No. 5, 1 quality, 2 cts.,	ordered Ap'l 29	22 00
Standard Oil Company,	3,000 No. 5, 1 quality, 2 cts.,	ordered Ap'l 18	66 00
A. G. Levy & Co.,	2,000 No. 5, 1 quality, 2 cts.		44 00
D. R. Burgess and Co.,	2,000 No. 5, buff, 1quality, 2 cts.,	March 5	44 00
M. Forchheimer,	2,000 No. 5, 2 cts.,	March 4	44 00
Do.	2,000 " "	Ap'l 13	44 00
M. B. Fitzpatrick & Co.,	2,000 " "	" 13	44 00
Simpson and Vizard,	500 like sample,	" 14	11 00
D. R. Dunlap,	1,000 " "	M'ch 30	21 80
H. Piser and Co.,	1,000 No. 5,	Ap'l 2	22 00
Vass & Brooks,	1,000 No. 5,	" 21	22 00
	2,000 "	M'ch 10	44 00

People's bank,	2,000	No. 5, Ap'l 2	44 00
Lowenstein Bros.,	1,000	" Feb. 16	22 00
Lowenstein "	1,000	" Ap'l 8	22 00
S. Richards a-d Son,	1,000	" May 7	22 00
First Nat. b'k,	5,000	" M'ch 15.....	110 00
J. J. Meyer & Co.,	500	brown, 4½, Ap'l 19	10 80
Donald Bros.,	500	No. 5, Ap'l 25....	11 00
			8714 00

21 The defendant objected to the introduction of said paper because it *it* was hearsay and incomp-tent*ent* evidence. The court overruled the objection, and the defendant excepted.

Witness further testified that after Mr. Hancock and himself, by inspection of the office, found said deficits, for witness's own satisfaction, he took Mr. Moore's cash book to find out how near the inspection agreed with his own account and his own book, and that it came to within five or six dollars of the same result.

The United States offered the original of a draft or check in words and figures as follows (their attorney stating to the court that he expected to show that the money was paid on the draft to the defendant, and that it was public moneys belonging to the United States):

Duplicate unpaid. No. 5071.

PENSACOLA, FLA., *May* 12, 1892.

The First National Bank of Pensacola

Pay to the order of C. E. Merritt, ass't P. M., $100.00, four hundred $\frac{00}{100}$ dollars, in current funds.

W. K. HYER, JR., *A. Cashier.*

To the People's bank, Mobile, Ala.

(Endorsed as follows:) Pay to P. D. Barker, P. M., at Mobile, Ala. C. E. Merritt, ass't P. M. P. D. Barker, P. M. Geo. S. Moore, ass't.

The defendant objected to the introduction of this paper because it did not appear from said paper that it was money-order funds and it was not shown that the postmaster at Pensacola had authority to exchange such funds for said paper. The court overruled the objection, and the defendant excepted.

22 Witness could not tell of his own knowledge how this check came, except after the inspection of the office had been finished the office received from the Pensacola post-office a duplicate draft on the People's bank at Mobile for four hundred dollars, and when this duplicate was presented for payment the bank produced the above original draft, which original draft showed that it had been paid to the defendant on the 13th day of May, 1892, and that they knew nothing of that from the inspection of the office because no record had been made of the receipt or payment of this original draft.

Witness was allowed to examine a memorandum made by him at the time the post-office was inspected for the purpose of refreshing his memory as to the amount of the shortage belonging to each particular fund. Witness stated that he knew the memorandum made at the time was correct, but he had no recollection of the particular amounts, and could not state them independent of such memorandum, after having examined it. The amounts and items constituting the memorandum were numerous.

Defendant moved the court to exclude all of the testimony of the witness so far as it related to the amount of the shortage which belonged to each particular fund, because the witness had no personal knowledge of the facts testified to. The court denied the motion, and the defendant excepted.

The United States then introduced P. D. BARKER, who testified that he was postmaster at Mobile, Alabama, in May, 1892, and that the defendant was assistant postmaster and had been for a year or more prior to that time; that by the rules and regulations of the office and by his direction all moneys coming into the office from the various sources, such as money-order funds, money from the sale of stamps, stamped envelopes, and orders for special-request envelopes, and the like, were paid over to the defendant and committed to his cus-
23 tody and care; that on the 16th day of May, 1892, the defendant was in the post-office performing his duties for the last time; that he failed to come to the office on the 17th day of May; that witness heard nothing from defendant on that or the following day; that he sought and enquired for him at his home and elsewhere; but did not find or get any information concerning his whereabouts, that witness, immediately after defendant failed to come to the office; on the 17th of May, telegraphed the department at Washington and requested Mr. L. F. Irwin to take charge of the office; that the safe was opened and found to contain about seventeen hundred dollars. Witness testified that he had investigated the special-request-envelope account by going around and seeing parties who claimed they had not received their envelopes. Here the district attorney handed to the witness a paper, in the handwriting of the witness, purporting to be a list of the parties who had ordered special-request envelopes and had paid in money for the same, it being the same paper shown by the witness Irwin to the defendant, and asked the witness to explain it to the jury. The defendant objected to witness explaining said paper because, it being in writing, it explained itself. The court overruled the objection and allowed the witness to state what the paper was, and the defendant excepted, and witness then stated that this paper was a list of special-request envelopes that had been ordered by different merchants in the city, to be printed at Washington and delivered to the parties when received here—when they were returned. That is what it is.

The witness was asked by the district attorney, "Did you find, in investigating the assets of the office, any shortage in the stamped envelopes?" The defendant objected to the question because he was not charged with taking or embezzling envelopes. The court

then asked, "Do you propose to show that there were a
24 number of stamped envelopes missing, and that the defendant had disposed of them and got money for them and the money was missing?" And the district attorney said, "We do." The court then overruled the objection, and the defendant excepted.

Witness stated that there was a shortage in the stamped envelopes, but could not state the amount.

It was proven that special-request envelopes are envelopes furnished by the Government, with the name and address of the party ordering them printed in the corner of the envelope, and parties desiring them deposited with the postmaster money to pay for their orders, and the postmaster is required to send the order to the Post Office Department, at Washington, and from there the orders for special-request envelopes are filled on the requisition of the postmaster, the postmaster retaining the money until the envelopes are furnished from Washington and delivered.

Witness testified that many of the special-request envelopes ordered through the defendant had been obtained and delivered after he had left the post-office and after the inspection was had.

The United States introduced ELLIS BARKER, who testified that he was the money-order clerk in the post-office at Mobile in May, 1892; that he remembered the day when the defendant failed to come to the office; that he could not remember whether he (witness) was present when the safe was opened; that he had received money from merchants for special-request envelopes and always gave the same, together with a memorandum of the names of parties and the number of envelopes desired, to the defendant; that witness received the money for special-request envelopes sometimes because defendant would be out of the office, and that witness would give receipts to the parties.

The United States introduced J. W. LITTLE, who testified
25 that he was the paying teller in the People's Bank of Mobile; that he had paid to the defendant the draft copied and set out in the testimony of L. F. Irwin; that one of the endorsements on the draft was in the handwriting of the defendant, and that the defendant endorsed the draft in his presence, and he paid the $400 to the defendant on May 13th, 1892.

The United States then introduced ROBERT A. SHELDON, who testified that he was in the employ of the Dunlap Mercantile Company and had paid money on account of said company to the defendant for special-request envelopes and had taken defendant's receipt for same. The receipt was then offered in evidence, being in words and figures as follows, to wit:

POST-OFFICE, MOBILE, ALA., *Mar.* 30, 1892.

Received of D. R. Dunlap Mercantile Company twenty-one and $\frac{80}{100}$ dollars for 1,000 envelopes to be ordered printed.

P. D. BARKER, *P. M.*
M.

Witness further testified that he received the envelopes, but that he could not say whether it was before or after the defendant left the post-office.

The United States then introduced WYNDHAM LYON, who testified that he was in the employ of B. F. Fitzpatrick and Company, and that he had ordered special-request envelopes for said firm and had paid money on account of such order to the defendant and had taken his receipt therefor. The receipt was here introduced in evidence, and it is in words and figures as follows:

POST-OFFICE, MOBILE, ALA., *April* 13, 1892.

Rec'd of B. F. Fitzpatrick & Co. forty-four dollars for 2,000 stamped envelopes to be ordered printed.

P. D. BARKER, *P. M.*

Witness also testified that he had received the envelopes ordered after the defendant had left the post-office, and received them
26 from Postmaster P. D. Barker.

The United States then introduced WHITFIELD THROWER, who testified that he was stamp clerk in the post-office in May, 1892, and during the whole of the year of 1892; that defendant was in charge of the money and business of the office; that he settled with the defendant every twenty-four hours and turned over to him all moneys he received; that defendant had the combination of the safe; that witness had received money from various persons on orders for special-request envelopes, and that he receipted for such moneys and turned the same over to the defendant.

Witness was interrogated by the district attorney about particular moneys received by witness, but the witness could not state that he received or paid over to the defendant any particular sum received from any designated person, but that he paid over all moneys so received by him; whereupon the defendant moved the court to exclude all the testimony of the witness, because he could not identify the moneys so received or paid to the defendant. The court overruled the motion, and the defendant excepted.

Several receipts were then offered in evidence, signed by the witness, who testified that he gave them for moneys paid for special-request envelopes in the temporary absence of the defendant, and that he turned over all the money to the defendant; that he gave receipts for no other kind of envelopes. Defendant objected because it had not been shown that the particular moneys mentioned in said receipts had been paid to defendant. The court overruled the objection, and the defendant excepted.

$44.00. MOBILE, *April* 22, 1892.

Received from People's bank forty-four dollars, 2 M. envelopes ordered printed.

P. D. BARKER.
T.

27

MOBILE, *April* 14, 1892.

Received of Simpson and Vizard eleven dollars for five hundred two-cent envelopes No. 5.

$11.00. THROWER.

MOBILE, *April* 2, 1892.

Received of H. Piser & Co. twenty-two dollars for one thousand two-cent envelopes No. 5.

$22.00. THROWER.

MOBILE, *M'ch* 10, 1892.

$44.00.

Received from People's bank forty-four dollars ac. 2 M. stamped envelopes printed.

P. D. BARKER.
THROWER.

MOBILE, *March* 24, 1892.

Rec'd of A. G. Levy and Co. forty-four dollars for two thousand two-cent envelopes, white color, No. 5.

THROWER.

The United States then introduced Mrs. RILEY, who testified that she was employed in the post-office at Mobile in 1892, and was still in the postal service; that she had given receipts for money paid in on orders for special-request envelopes, and had paid the money so received to the defendant, then assistant postmaster. The receipts were then offered in evidence and read as follows:

MAY 5TH, 1892.

Received of Pillans, Torrey and Hanaw ten dollars and eighty cents for special-request envelopes, 2nd quality.

$10.80. P. D. BARKER, *P. M.*
R.

MAY 7TH, 1892.

Received of S. Richard and Son twenty-two dollars for special-request envelopes.

$22.00. P. D. BARKER, *P. M.*,
By K. T. R.

The witness, being cross-examined, said that she had no recollection of having received the particular money mentioned in said receipts except from her general habit and custom, and that it was her practice to give no receipts without receiving the money, and that her recollection was that she received the money for
28 which the said receipts were given, and that she paid it over to the defendant; thereupon the defendant moved the court to exclude all of the testimony of the witness because it is incompetent. The court denied the motion, and the defendant excepted.

The United States then introduced one BENJAMIN B. COX, who testified that he had been for a long time and was then connected with the post-office at Mobile; that in May, 1892, defendant was assistant postmaster and had charge of the money of the office; that he met the defendant on the evening of the 16th of May, 1892, after defendant left the post-office, and told him that the postmaster "had caught on to the special-request stamped-envelope matter," and witness said to defendant, "For Heaven's sake, George, fix up that stamped-envelope business as soon as you can;" that he sought the defendant as his friend to caution him; that he knew there was trouble of some kind about the special-request envelopes because of the enquiries of the people at his window for overdue envelopes that they had ordered; that the defendant made no reply to him.

The district attorney then asked the witness the following question: "Did you see stamped envelopes being taken out of the office to printing establishments here in town?"

The defendant objected to the question because the defendant is not charged with such an offense; thereupon the district attorney stated that he had shown and expected to show that a number of persons who had ordered special-request envelopes and paid in their money for them had not received their envelopes and had made complaint at not receiving them, and when these complaints became urgent the defendant sent out from the post-office to local printers in Mobile some stamped envelopes that belonged to the office
29 to have printed or marked for delivery under some of these orders for special-request envelopes. The court overruled the objection, and the defendant excepted.

Witness testified that he had seen stamped envelopes carried out of the post-office in the spring of 1892, between January and May; that some were carried out by Walter Brazil and by Jim Smith.

The defendant objected to this testimony of the witness and moved the court to exclude the testimony because the defendant was not charged with taking stamped envelopes to printing offices or anywhere. The court overruled the objection and denied the motion and the defendant excepted.

Witness could not say what number of envelopes had been carried out, but that he had seen an armful of stamped envelope boxes; that a box usually contains five hundred stamped envelopes.

The defendant moved to exclude this testimony because it is incompetent. The court overruled the motion and the defendant excepted.

The United States then introduced W. J. PATTERSON, who testified that he was the proprietor of a printing establishment in the city of Mobile and had printed business cards on stamped envelopes for defendant and had done so at intervals between January and May, 1892. Witness stated that he could not from memory and without consulting a statement taken from his books of account which was made by him tell how many envelopes were printed for the various firms whose cards were printed on the envelopes, and

that he could not tell, after looking at the statement and from recollection independent of the statement, anything of the particulars of the transaction to which it referred, but he knew of his personal knowledge that his firm printed cards on stamped envelopes for numerous business men and firms at defendant's request, and that defendant paid his firm for printing them.

The defendant moved the court to exclude the testimony of
30 the witness because it is not original testimony. The court denied the motion and the defendant excepted.

The witness then read from his statement the number of envelopes upon which cards of the several firms had been printed, and testified that defendant had procured him to do the work and had paid him for it.

On cross-examination the witness testified that the statement from which he read did not contain all the dates when the printing was done, and that said statement was not a copy of his books as to such dates, which he had omitted to put on it.

The defendant renewed the motion to exclude all the testimony of the witness because it is shown that the statement read from is not a copy of the witness's books. The court denied the motion and the defendant excepted.

The United States then introduced C. E. MERRITT, who testified that he lived in Pensacola, Florida; that he was connected with the post-office there as assistant postmaster in May, 1892, and that as such he purchased the draft then shown to him and which is hereinbefore set out already in evidence.

Witness had bought said draft from the First National bank at Pensacola, Florida, and that said draft was a remittance of money-order funds. It was proven that the post-office at Pensacola was required by the post-office regulations to remit all surplus money-order funds to the Mobile, Alabama, post-office.

Defendant here moved the court to exclude the testimony of the witness because it was offered for the purpose of showing the misappropriation of money-order funds, a distinct, separate statutory crime with which the defendant is not charged, the second count of the indictment, charging embezzlement of money-order funds,
31 having been stricken out on demurrer. The court denied the motion and the defendant excepted.

The United States then introduced WALTER BRAZIL, who testified that he, by order of the defendant, carried boxes of stamped envelopes to the printers in Mobile in the spring of 1892; that Jim Smith had taken out boxes of envelopes a lot of times by order of the defendant, and that this was some one or two months before the defendant left the post-office and quit working there; that he helped Smith to tie them up.

The United States then introduced JAMES SMITH, JR., who testified that he carried boxes which contained stamped envelopes out of the post-office to the printing office of Graham and Delchamps; that he

so carried them at the request of the defendant; that he could not state how many envelopes he carried nor the year when he so carried them.

Defendant moved to exclude all the evidence of the witness because it is not shown that the carrying out of envelopes had been done within three years before the finding of the indictment; the court denied the motion and the defendant excepted.

The United States then introduced JAMES SMITH, SR., who testified that he was night watchman in the post-office at Mobile in May, 1892; that he was there as such watchman from January, 1892, up to and including the time when the defendant left the office; that he was careful and attentive to his business and duties as such watchman and never saw anybody coming in or going out of the office except such persons as had authority to be there and had access to said office.

The United States offered as a witness one DELCHAMPS, who testified that he was proprietor of the printing house of Graham and Delchamps; that he printed cards for the defendant on stamped envelopes and was paid therefor by the defendant, and that the printing was done during the spring of 1892, ranging from February to May, 1892.

The Government here rested its case.

32 The defendant introduced one BRYANT, who testified that he was a locksmith and had been such for a number of years; that he was called on by P. D. Barker, the postmaster at Mobile, in May, 1892, to open a safe, and that he went to the post-office in a buggy with said Barker, and thinks it was about the middle of the day when he went there; that when he and the said Barker reached the post-office they found the safe already opened; that it was opened just as they went in and half a dozen people were standing around it, and it had been opened by some one who knew the combination; that said combination and bolts were in good working order, and that he saw four or five persons around the safe at the time and saw small stacks of silver money piled up inside the safe, and that the contents of the safe seemed to be somewhat in confusion.

Defendant then introduced one THURBER, who testified that he visited the defendant on the night of the 18th of May, 1892, and found him in a sick condition; that defendant seemed to be in a stupor; that witness sat up with him during the night and defendant was quite sick and was tumbling and tossing.

Defendant then introduced Dr. J. G. THOMAS, who testified that he was a practicing physician and had been engaged in his profession for about thirty years; that he had attended defendant during the month of May, 1892, and for some time prior thereto; up to the 18th of May he had never gone to see him, but had treated him

by defendant coming to his office; that up to that time defendant had attended to his business so far as witness knew; that defendant had been suffering some from malarial fever; that on the night of the 18th of May, 1892, he was called to the bedside of the defendant and found him right sick and very nervous, and that on the following day the defendant removed from the house where
33 the witness had first seen him on the night of May 18th, 1892, to the defendant's own home; that for some time he had advised that defendant was too sick to see company, and that defendant was confined to his rooms for some weeks after the 18th of May.

Defendant's counsel, before commencement of the argument, moved the court to exclude from the jury all the testimony of C. E. Merritt, who was called and sworn by the United States, because he failed to show that he had authority to take the postal money-order funds from the office in Pensacola and buy such a draft as the one introduced in evidence. The court denied the motion and the defendant excepted.

This being substantially all the evidence in the case, the court, among other things, gave to the jury the following charge:

If you believe from the evidence, beyond a reasonable doubt, that the defendant was assistant to the postmaster in the post-office at Mobile, and that he embezzled or wrongfully converted to his own use any money which came into his possession or under his control in the execution of his office or employment as such assistant, and that the money so embezzled or wrongfully converted was the money of the United States, and that such embezzlement or wrongful conversion occurred within two years prior to December 3rd, 1893, and in the city of Mobile, then it would be your duty to return a verdict of guilty under the fourth count of the indictment, and it would be your duty further to assess a fine equal to the value of the money which was embezzled or converted. The amount and value of the money charged in the indictment is more than sixteen hundred dollars, and the court charges you that it is not necessary for the United States to prove that this entire amount was embezzled, but that it or some part thereof was embezzled as charged. If, then, you are satisfied from the evidence that any part of this sum was embezzled, it would be your duty to find a verdict of guilty
34 and assess a fine equal to the value of such part.

Embezzlement is the fraudulent appropriation of money or other property by a person to whom it has been entrusted. In other words, it is the fraudulent appropriation to his own use by a public officer or other person acting in a fiduciary capacity—that is, in a capacity of trust or confidence.

The court charges you that when money has been paid to a post-office upon an order for special-request envelopes it becomes the money of the United States.

If you do not find from the evidence that the defendant in the execution of his office or employment as assistant to the postmaster at Mobile had in his possession or under his control the money of the United States which he is charged to have embezzled, but you

do believe from the evidence that he did have such money in his charge and custody by the request or direction and authority simply of the postmaster, and, having such possession of said money, was entrusted only with the care and oversight of the same, and you further believe from the evidence that the defendant with a fraudulent intent converted said money or any portion thereof to his own use without the assent of the United States, the owners thereof, and with the intent to deprive said owners permanently of the same, then it would be your duty to return a verdict of guilty under the first or third count of the indictment.

Embezzlement is the wrongful conversion by an employee or officer of money or property coming into his possession by virtue of his employment or office.

Larceny or stealing is the fraudulent conversion or taking of money or property by a person who has the bare charge or custody of such money or property, whose possession is for some
35 certain special purpose or only for the mere care and oversight of the money or property, and the conversion being to deprive the owner of it permanently without his consent. The constructive taking in such case is sufficient to constitute larceny, although at the time of receiving the money or property the felonious intent did not exist in the mind of the person charged.

The court also gave to the jury at defendant's request the following charges in writing:

2. The court charges the jury that if, after considering the evidence, they believe there is a probability of defendant's innocence, they must acquit the defendant.

5. Before the jury can convict this defendant the evidence must satisfy your minds beyond all reasonable doubt and must exclude every other reasonable hypothesis than that of his guilt.

9. The court charges the jury that if from the evidence they have a reasonable doubt of the guilt of the accused they must acquit him.

11. The court charges the jury that if they believe from the evidence that the defendant had in his possession or under his control as assistant postmaster the money or property alleged to have been embezzled, and that the same had not been used, loaned, exchanged for other funds, converted, or deposited without authority, then they must acquit the defendant.

The defendant then and there excepted to the giving of the charge and to the following portions of said charge, to wit:

All that part relating to larceny and—

"If the jury find the defendant guilty under the fourth count of the indictment, they will assess a fine equal to the value of the money which was embezzled or converted;" and also—
36 "When money has been paid to a post-office upon an order for special-request envelopes it becomes the money of the United States."

The defendant also excepted severally and separately to the refusal of the court to give each of the following charges requested by him in writing:

4. The court charges the jury that if they believe from the evidence that the defendant was an assistant, clerk, or employed in or connected with the business or operations of the money-order office, they cannot under the indictment in this case convict the defendant of embezzling the money-order funds of the United States.

3. The court charges the jury that under the indictment in this case the defendant cannot be convicted for the embezzlement of any part of the postal revenues, and if the evidence shows the money alleged to have been embezzled they must acquit the defendant.

7. The jury must believe from the evidence and beyond all reasonable doubt that George S. Moore did not have this money and did not pay it over upon demand before you can convict.

8. The court charges the jury that in order to convict the defendant they must be satisfied that a demand was made upon him for the amount of money or property alleged to have been embezzled, and that upon such demand by some person authorized to make it he failed to pay over said money or to deliver said property.

1. The court charges the jury that if they believe the evidence they must acquit the defendant.

10. The court charges the jury that before they can convict the defendant they must be satisfied beyond all reasonable doubt of his guilt and the evidence must be such as to exclude every other reasonable hypot-esis than that of defendant's guilt.

37 12. The court charges the jury that if they believe the evidence they must acquit the defendant of larceny charged in the first and third counts of the indictment.

6. The court charges the jury that they cannot convict the defendant under this indictment for the embezzlement of money-order funds nor for the embezzlement of what is known in the postal regulations as the key-deposit fund or key-deposit forfeiture fund of the United States nor for the embezzlement of any funds deposited with him for special-request envelopes nor for the embezzlement of postage stamps or stamped envelopes entrusted to him by law.

And the defendant now presents this his bill of exceptions and prays that the same may be signed within the time prescribed by the order of this honorable court, which is accordingly done this 20th day of July, A. D. one thousand eight hundred and ninety-five.

HARRY T. TOULMIN, *Judge.*

Filed July 20th, 1895.

RICH'D JONES, *Clerk.*

38 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the southern district of Alabama, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before

you, between The United States, plaintiff, and George S. Moore, defendant, a manifest error hath happened, to the great damage of the said defendant, George S. Moore, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, District of Columbia, within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, Southern Dist. of Ala.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 2nd day of July, in the year of our Lord one thousand eight hundred and ninety-five.

RICH'D JONES,
Clerk U. S. Circuit Court, Sou. District Alabama.

Allowed by—
HARRY T. TOULMIN,
Judge of the District Court of the United States.

U. S. District Court, Sou. Dist. Alabama.

Received the within writ in my office July 2d, 1895.
RICH'D JONES, *Clerk.*

39 *Citation in Error.*

THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the southern district of Alabama, wherein George S. Moore is plaintiff in error and The United States of America are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Honorable Harry T. Toulmin, judge of the district court of the United States for the southern district of Alabama, this the 2nd day of July, in the year of our Lord one thousand eighteen hundred and ninety-five.

HARRY T. TOULMIN,
Judge of the District Court of the United States for the Southern District of Alabama.

I hereby acknowledge service of the above citation this 20th day of July, A. D. 1895.

J. N. MILLER,
U. S. Attorney, Southern Dist. of Ala.

40 THE UNITED STATES OF AMERICA:

District Court of the United States for the Southern District of Alabama.

I, Richard Jones, clerk of the said district court of the United States for the southern district of Alabama, do hereby certify that the foregoing thirty-nine (39) pages contain a full, true, and correct transcript of the record, assignment of errors, bill of exceptions, and all proceedings in the case No. 1105, wherein The United States are plaintiffs and George S. Moore is defendant, except that the original writ of error and citation in error and service are included therein instead of copies thereof, as fully as the same appear of record and on file in my office.

Witness my hand and the seal of the district court of the United States, affixed at the city of Mobile, Alabama, on this the 27th day of July, A. D. 1895.

[Seal United States District Court, Southern Dis. of Alabama.]

RICH'D JONES, *Clerk.*

Endorsed on cover: Case No. 16,009. S. Alabama D. C. U. S. Term No., 719. George S. Moore, plaintiff in error, *vs.* The United States. Filed August 27, 1895.

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FILED.
OCT 14 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 719.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, PLAINTIFF IN ERROR, v. THE UNITED STATES. No. 719.

MOTION TO ADVANCE.

The plaintiff in error was indicted in the district court of the United States for the southern district of Alabama for embezzling money-order funds from the Mobile post-office, in violation of sections 4046, 5456, 5467, and the act of March 3, 1875, to the amount of $1,652.59. He was found guilty, and sentenced to two and one-half years' imprisonment at hard labor. He was admitted to bail in the sum of $2,000 on July 31 last pending the decision of this court on his writ of error.

The Solicitor-General, on behalf of the United States, respectfully moves the court to advance the case upon the docket and set it down for hearing on such day during the present term as may be convenient to the court.

Notice of this motion has been served on the counsel for the plaintiff in error, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

FILED.
NOV 11 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.
No. 719.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, Plaintiff in Error,
vs.
THE UNITED STATES,
Defendant in Error.
No. 719.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was Assistant Postmaster at Mobile, Alabama, previous to and during part of the year 1892. At the November Term, 1893, of the District Court of the United States for the Southern District of Alabama, the defendant was charged by the Grand Jury in an indictment containing four counts, with the larceny and embezzlement of $1652.59, the property of the United States. The second count of the indictment charging the embezzlement of "*Money Order funds*" was stricken out on demurrer. As to the first and third counts charging larceny, a verdict of *not guilty* was returned by the jury. The defendant was convicted under the fourth count purporting to charge embezzlement, in the following words:

"FOURTH COUNT.

"The Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that George S. Moore, late of the

district aforesaid, heretofore, to-wit: On the eighteenth day of May, eighteen hundred and ninety-two, and before the finding of this indictment, and within said Southern District, in the city of Mobile, in the State of Alabama, he, the said George S. Moore, being then and there an assistant, clerk or employee in, or connected with the business or operations of the United States Post-office in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and fifty-nine one-hundredths ($1652.59) dollars, money of the United States, of the value of sixteen hundred and fifty-two and fifty-nine one-hundredths ($1652.59) dollars, the said money being the personal property of the United States.

"Contrary to the form of the Statute in such case made and provided and against the peace and dignity of the United States."

The court having overruled the defendant's demurrers to said count, alleging its insufficiency as an indictment for embezzlement, the United States then offered evidence tending to prove that upon an official inspection of the Post-office at Mobile in May, 1892, the office was found to be in default the sum of $1652.59, made up of the following particular public funds, to-wit: Postal funds, $381.59; Money Order funds, $400.00; Special Request Envelope fund, $714.00; Key Deposit fund, $157.00. There was no proof tending to show that the Key Deposit fund ($157.00) ever came to the possession of the defendant, or was converted by him. The court permitted proof against the objection and exception of the defendant of the loss by the United States of $400.00, part of its Money Order funds. The only evidence as to shortage was that of witnesses who had examined the books and records of the Post office and who had no other sources of information. The books and records were not produced in evidence.

The court, among other things, charged the jury, "If you believe from the evidence beyond a reasonable doubt that the defendant was Assistant of the Postmaster in the Post-office at Mobile, and that he embezzled or wrongfully converted to his own use any money which came into his possession, or under his control, in the execution of his office or employment as such

Assistant, and that the money so embezzled or wrongfully converted was the money of the United States, and that such embezzlement or wrongful conversion occurred within two years prior to December 3d, 1893, and in the city of Mobile, then it would be your duty to return a verdict of guilty under the fourth count of the indictment, and it would be your duty further *to assess a fine equal to the value of the money which was embezzled or converted.*"

The jury returned the verdict in the following words: "We, the jury, find the defendant guilty as charged in the fourth count of the indictment, and assess a fine against him of sixteen hundred and fifty-two and fifty-nine one hundredths ($1652.59) dollars, and we find him not guilty as to the other counts."

At a subsequent day of the term the court made the following order of sentence: "It is now ordered by the court that the defendant, George S. Moore, be imprisoned for the period of two and one-half years at hard labor in the King's County Penitentiary at Brooklyn, in the State of New York."

ASSIGNMENTS OF ERROR.

First. The court erred in overruling the demurrers to the indictment.

Second. The court erred in overruling the demurrers to the fourth count of the indictment.

Third. The court erred in overruling the motion of defendant to exclude the testimony of the witness Hancock.

Fourth. The court erred in allowing the introduction in evidence of the paper purporting to be a list of persons ordering special request envelopes and paying in money for the same, prepared by the Postmaster.

Fifth. The court erred in allowing the introduction of the draft or check during the examination of the witness Irwin.

Sixth. The court erred in overruling the motion of defendant to exclude the testimony of the witness Irwin.

Seventh. The court erred in allowing the witness P. D. Barker to explain the paper to the jury previously admitted in evidence.

Eighth. The court erred in allowing the question to the witness Barker as to whether stamped envelopes had been taken out of the Post-office by defendant.

Ninth. The court erred in overruling the motion of defendant to exclude the testimony of the witness Thrower.

Tenth. The court erred in overruling the motion of defendant to exclude the testimony of the witness Cox, relating to the taking of stamped envelopes.

Eleventh. The court erred in overruling the motion of defendant to exclude the testimony of the witness Merritt.

Twelfth. The court erred in overruling the motion of the defendant to exclude the testimony of James Smith, Jr.

Thirteenth. The court erred in its general charge to the jury.

Fourteenth. The court erred in the following portions of its general charge, viz: "If the Postmaster entrusted the public funds to the defendant without reference to his position, then he would be guilty of larceny."

"If the jury find the defendant guilty under the fourth count of the indictment they will assess a fine equal to the value of the money which was embezzled or converted.

"When money has been paid to a Post office upon an order for special request envelopes, it becomes the money of the United States."

Fifteenth. The court erred in refusing to give charges numbered one, three, four, six, seven, eight, ten and eleven, requested in writing by the defendant.

Sixteenth. The Court erred in denying the motion in arrest of judgment.

Seventeenth. The Court erred in its final judgment in said cause.

ARGUMENT.

The Court erred in overruling the demurrers of defendant to the fourth count of the indictment and in denying the motion in arrest of judgment on account of the insufficiency of said fourth count. The count in question under which the defendant was convicted charged no offense against the laws of the United States. It neither describes with certainty or accuracy, the person charged or the thing embezzled, and fails to charge that the thing (money) alleged to have been embezzled came to the possession of the defendant by virtue of any office, agency or employment. The count of the indictment under which defendant was convicted is without precedent, and so far as diligent investigation has disclosed, no indictment for the crime of embezzlement from which these allegations have been omitted, has been approved by a court of last resort, since the enactment of the first statute on the subject to the present time.

"There must be some averment of the fiduciary relation sustained by the defendant and made by the statute and element of the offense."

2d Bishop Crim. Pro., Section 323, page 133.

"All that is to be proved must be alleged."

1st Bishop New Crim. Pro., Sec. 519, page 324.

"A distinct fact necessary to be proven at the trial must be averred in the indictment."

United States vs. Atkinson, 34 Fed. Rep., 317.

U. S. vs. Carl, 105 U. S., 611.

It must be averred—

First. That the defendant stood in some fiduciary relation, etc.

Second. That by virtue of said relation, etc.

Third. That he did embezzle, etc.

2d Bishop Crim. Pro., Sec. 315, page 128.

2d Bishop Crim. Pro., Sec. 323, page 133.

The phrases by virtue of said employment or in the execution of said office or some equivalent averment in indictments for embezzlement are contained in the books of precedents and in the decided cases wherein the indictments are set out at large.

2d Archbold Pleading and Practice, (Pomroy's edition), Sec. 1337.

Bishop's Directions and Forms, Secs. 403-410, pages 211-218.

1st Wharton's Precedents of Indictments, page 465.

Loveland's Federal Pro., No. 483, page 453.

United States vs. Hartwell, 6 Wallace, 385.

United States vs. Borneman, 36 Fed. Rep. 258.

United States vs. Harper, 33 Fed. Rep. 474.

Huffman vs. State, 89 Ala. 33.

Lowenthal vs. State, 32 Ala., 589, and cases therein cited.

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right to be informed of the nature and cause of the accusation."

United States vs. Cruikshanks et al., 92 U. S. 542.

In all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged.

United States vs. Mills, 7 Peters (U. S.) 142.

With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or reversed on error.

United States vs. Cook, 17 Wallace (U. S.) 168.

The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his acquittal or conviction for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.

United States vs. Cruikshanks et al., 92 U. S. 558.

The count in question contains no such description of the charge as will enable the defendant to avail of his conviction or acquittal for protection against a further prosecution for the same cause. The substance of the allegation is that the defendant "did embezzle the sum of sixteen hundred and fifty-two and 59-100 dollars." There is no allegation that defendant was an assistant of any officer of the United States; the position he held in the post office at Mobile is not stated with reasonable certainty. The "money of the United States," alleged to have been embezzled is not identified or described, and it is not alleged to have come to the possession of the defendant by virtue of his employment in, or connection with the business or operations of the United States post office at Mobile.

"An indictment for embezzlement must set forth the *actual fiduciary relations and its breaches.* Everything must be averred which is necessary to bring the case within the statute."

American and English Encyclopedia of Law, Volume 6, page 495.

"Penal offenses created by statute, whether to be prosecuted by an indictment or information, must be accurately and clearly described in the pleading for the recovery of the penalty; and if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent, as it is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed so as to bring the accused within the true intent and meaning of the statute defining the accusation."

U. S. vs. Mann, 95 U. S. 585.

"No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly and not inferentially, or by way of recital."

U. S. vs. Hess, 124 U. S. 483.

An indictment containing in one count so much of the language of two sections of the Statute of Embezzlement as to leave it uncertain which of the two different crimes of embezzlement is charged is insufficient.

State vs. Messenger, 58 N. H. 348.

8 C. L. Cr. L. Mag. 459.

The offense with which the defendant was charged is purely statutory, and if the conviction stands it must be sustained under the provisions of some statute of the United States. Do not the vague and indefinite allegations of the fourth count of the indictment leave it uncertain as to the particular statute, within the provisions of which the case is sought to be brought and the particular crime of embezzlement intended to be charged? The statutes of the United States denounce as embezzlement, and provide for the punishment of a great variety of acts as such, when committed by postal officials and employes. While embezzlement by postal officials and employes is in every instance a misdemeanor, the punishment provided by the several statutes differs as widely in degree as the cases are various in character, and in order to sustain a conviction, the allegations of the indictment must be such as will bring the case

within the true intent and meaning of a particular statute, otherwise the defendant is not informed of the nature and cause of the accusation and cannot avail of his conviction or acquittal as protection against a subsequent prosecution for the same cause, and the court can neither determine the sufficiency of the indictment or correctly adjudge the punishment in the event of a conviction. The impossibility of referring the allegations of the fourth count of the indictment in this case with clearness or certainty to any particular statute is shown by the action of the trial court in:

First. Admitting against the objection and exception of defendant proof of the conversion of "Money Order funds" a misdemeanor, for which the offender is to be punished under the provisions of R. S., Sec. 4046, by imprisonment "for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled."

Second. Directing in its general charge a conviction for a misdemeanor under the fourth count according to the provisions of the act of February 3d, 1879, Sup. R. S., Vol. 1, page 213; the offense being punishable by "a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment, not less than three months nor more than ten years, or by both such fine and imprisonment."

Third. Adjudging the defendant guilty of a felony and sentencing him to hard labor in the penitentiary under the provisions of the act of March 3d, 1875, Sup. R. S., Vol. 1, page 88; providing that offenders against its terms shall be "deemed guilty of felony" and punished "by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted."

The court by its several actions above named referred the count of the indictment in question to three separate and distinct statutes of the United States enacted at long intervals of time and having no relation to the other.

The Court erred in overruling the motion of defendant, to exclude the testimony of the witness Hancock. [Record page ——.]

The Court erred in overruling the motion of defendant, to exclude the testimony of the witness Irwin. [Record page ——.]

The witness John Hancock, was a post office inspector, and conducted the official inspection of the office. This witness testified, among other things, not material, "that he came to Mobile, Alabama, on the 17th day of May, 1892, and on the 18th day of May, 1892, commenced an examination of the post office at Mobile, and made a thorough investigation of the same, and of the post office records, including the books and accounts kept by the defendant, as Assistant in the post office; that he concluded said examination on the 27th day of May, 1892; that he found said office short the sum of sixteen hundred and fifty-two dollars and fifty-nine cents, made up of the following particular funds, viz: Postal funds, $381.59; money order funds, $400.00 special request envelope fund, $714.00. That this special request envelope fund was a thing witness took very little hand in as the postmaster did, that the postmaster canvassed the town to find who had paid money for special request envelopes and given orders for them, and it was found there was $714.00 shortage in that account. Witness had no personal knowledge of the steps taken in this matter, and knew only what the postmaster had told him—that there was a shortage in what is known as the key deposit fund of $157.00, making a total of sixteen hundred and fifty-two and 59 100 dollars; witness had no personal knowledge of the causes of said deficit, other than such as he gained from an inspection of the post office, the stock, the books and records referred to, and from talking with persons connected with the office."

To the same effect the witness Irwin testified in substance that the only knowledge he had on the subject of the shortage and the amounts belonging to particular public funds, was de-

rived from an inspection of the books, records, &c., of the post office, made while assisting the inspector in his work; that he had no personal knowledge of any of the transactions or the causes that led to them.

The action of the court in allowing the testimony of the witnesses quoted above without a production of the documents, records, books, &c., was in the highest degree violative of the fundamental rule of evidence, forbidding the introduction of hearsay and requiring the production of "the best evidence of which the case, in its nature, is susceptible."

Every book, document and record inspected by the witnesses, the contents of which they were permitted to speak about, were the property of and in the control and custody of the United States, and within the power of the party to produce them. They constituted "the best evidence of which the case in its nature was susceptible," and should have been produced.

Greenleaf on Evidence, 1 Vol., Sec. 82, 13th Edition.

The rule of evidence insisted upon by the defendant has been recognized by Congress, and in part obviated by directing the courts to receive properly certified transcripts of postal records and accounts. [R. S. Sec. 889.]

The Court erred in allowing the question to the witness P. D. Barker as to whether stamped envelopes had been taken out of the post office by the defendant. [Record page ——.]

The Court erred in overruling the motion of defendant to exclude the testimony of the witness Cox, relating to the taking of stamped envelopes. [Record page ——.]

The two witnesses, P. D. Barker and B. B. Cox, were allowed, against the objection and exception of the defendant, to prove the taking of stamped envelopes from the post office.

There was no allegation in the indictment under which such proof was proper or competent. The unlawful disposition of postage stamps or stamped envelopes for any purpose whatever, by any person entrusted with the sale of the same, is

made embezzlement by Sec. 4053 R. S. It is a distinct statutory crime, not charged by the indictment and evidence of it, necessarily tended to prejudice the defendant without elucidating any issue properly involved in the trial.

The Court erred in overruling the motion of the defendant to exclude the testimony of the witness Merritt. [Record page ——.]

This witness testified in substance that a draft for $400.00, shown to have come to the possession of the defendant was drawn by the postmaster at Pensacola, and was a remittance of *money order funds*. The embezzlement of *money order funds* is a separate statutory crime, punishable under the provisions of R. S., Sec. 4046. The District Attorney for the United States had attempted to charge the offense in the second count of the indictment, but the same was held insufficient by the court. The proof was admitted after the court had stricken from the indictment the only allegation under which it could have been relevant or competent.

The Court erred in the following portions of its general charge, viz: "If the jury find the defendant guilty under the fourth count of the indictment, they will assess a fine equal to the value of the money which was embezzled or converted." [Record page——.]

"When money has been paid to a post office upon an order for special request envelopes it becomes the money of the United States." [Record page——.]

The charge of the court instructing the jury to assess a fine against the defendant was unauthorized by any statute of the United States. The court alone *in a proper case could impose a fine*. The general charge of the court, in which this specific direction to the jury to assess the fine occurs, referred the fourth count of the indictment to the act of February 3d, 1879, entitled "An act to amend Section 5497 of the Revised Statutes, relating to embezzlement by officers of the United States." Sup. R. S., Vol. 1, page 213.

Said act does not require the imposition of a fine arbitrarily. The requirement of the statute is that the offender shall be punished by a fine equal to the value of the property or money embezzled, or by imprisonment, or by both such fine and imprisonment. All reference to the fine imposed by the jury is omitted by the court in its final judgment.

Money paid into a post office upon an order for special request envelopes is not taken up or accounted for as postal revenues until the delivery of the envelopes, and does not until then become the money of the United States.

The Court erred in refusing to give charges numbered one, three, four, six, seven, eight, ten and eleven, requested in writing by the defendant. [Record page——.]

The charges asked by the defendant and refused by the court, as applied to the proof and allegations of the indictment, asserted correct propositions of law. The evidence submitted to the jury tended to show the misappropriation of a certain sum of money made up of parts of particular public funds, the embezzlement of which is prohibited and punished by particular statutes of the United States.

R. S., Sections 4046, 4053, act February 3d, 1879.
Sup. R. S., Vol. I, page 213.

In order to render competent and relevant proof of the embezzlement or misappropriation of these particular funds, viz: Money order and postal funds, or key deposit fund, or to sustain a conviction for such offenses, the indictment must contain allegations bringing the case within the true intent and meaning of the particular statute. The fourth count of the indictment contained no allegation charging the embezzlement of any of the particular funds or property disclosed by the proof, and the court should have directed the acquittal of the defendant.

The Court erred in its final judgment in said cause. [Record page——.]

The plaintiff in error was sentenced to imprisonment "for

the period of two and one-half years at hard labor in the King's County Penitentiary at Brooklyn, in the State of New York." Is this judgment authorized by any statute of the United States, to which the allegations of the indictment and the proof in the case can be referred?

"In the courts of the United States the rule is that the judgment in a criminal case must conform strictly to the statute, and that any variations from its provisions, either in the character or extent of the punishment inflicted, renders the judgment absolutely void."

Harman vs. U. S. 50 Federal R. 921.

In re Graham 138, U. S. 461.

The evidence in this case shows that the post office at Mobile, Alabama, was in default with the United States the sum of sixteen hundred and fifty-two and 59-100 dollars, made up from several particular public funds, viz: *Money order funds*, funds known as *postal revenues*, *key deposit fund*, being the sums deposited to secure the return of keys to lock boxes by persons renting said boxes. There also was proof tending to show the misappropriation of stamped envelopes.

The embezzlement or misappropriation of any part of the particular funds or property disclosed by the evidence as having come to the possession of the defendant, plaintiff in error, is a separate and distinct misdemeanor, made so by separate statutes of the United States, providing a distinct punishment in each case.

Under an indictment containing a sufficient number of counts properly drawn, either one or all of the offenses disclosed by the proof could have been charged and proven, and the appropriate statutory punishment awarded upon a verdict:

First. The embezzlement of money order funds could have been prosecuted under the provisions of R. S., Sec. 4046, and the offender punished by imprisonment "for not less than six months nor more than ten years, and fined in a sum equal to

the amount embezzled." Both fine and imprisonment must be imposed, but not imprisonment at hard labor.

Second. The embezzlement of any money that constituted part of the postal revenues as well as the embezzlement of stamped envelopes, could have been prosecuted under the provisions of R. S., Sec. 4053, and the offender punished by "a fine of not more than double the sum so retained, or by imprisonment for not more than three years, or both." Imprisonment at hard labor is not authorized by this statute.

Third. The embezzlement of the key deposit fund could have been prosecuted under the provisions of the act of February 3d, 1879, Sup. R. S., Vol. 1, page 213, and the offender punished by "a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment." Imprisonment at hard labor is not authorized by the terms of this statute; and under the provisions of the statutes quoted above, all the offenses disclosed by the evidence were misdemeanors, as indeed are all offences known in the statutes as "Postal Crimes."

Under R. S., Sec. 4046, a sentence of imprisonment without any fine is invalid.

Woodruff vs. U. S., 58 Federal R. 766.

The plaintiff in error was adjudged guilty of a felony, punishable under the provisons of the act of March 3d, 1875, Sup. R. S., Vol. 1, page 88. This statute is *general* in its application to "*any person* who shall embezzle, steal or purloin any money of the United States." It was enacted subsequent in point of time to Sections 4046 and 4053 of the Revised Statutes, and its title "*An Act to punish certain larcenies and the receivers of stolen goods*" would indicate no legislative purpose to change

or affect any special statute then of force relating to the embezzlement of public funds by officials of the United States.

"General and specific provisions in apparent contradiction whether in the same or different statutes, and without regard to priority of enactment, may subsist together; the specific (R. S. 4046 and 4053) qualifying and supplying exceptions to the general." (Act March 3d, 1875.)

Chamberlain vs. State, 50 Ark., 132.

A. & E. Encyclopedia, Vol. 23, page 429.

Townsend vs. Little, 109 U. S., 504.

Southerland on Statutes, Sec. 325, page 412.

"A special act is not modified or controlled by a subsequent general act upon the same subject, unless the latter clearly manifests on its face such an intention."

Mobile and Ohio R. R. vs. State, 29 Ala., 573.

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment."

United States vs. Wiltberger, 5 Wheaton.

"Penal statutes cannot be extended beyond the obvious meaning of their terms on any plea of failure of justice, and if there is a fair doubt whether the act charged is embraced in a *criminal prohibition*, that doubt is to be resolved in favor of the accused."

United States vs. Garretson, 42 Federal R., 22.

From the foregoing discusson we submit, in conclusion, that there is manifest error in the record, and the case should therefore be reversed.

M. D. WICKERSHAM,
And McINTOSH & RICH,
Attorneys for Plaintiff in Error.

FILED
NOV 20 1895
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 719.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

GEORGE S. MOORE, PLAINTIFF in error,
v.
THE UNITED STATES.

No. 719.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

George S. Moore, plaintiff in error, late assistant postmaster of the city of Mobile, was indicted, among other things, for embezzling $1,652.59, moneys of the United States, on May 18, 1892. He was tried before Judge Toulmin and a jury, and convicted June 7, 1895.

There were three other counts in the indictment, but a demurrer to one was sustained, and upon two he was acquitted. The fourth count, upon which he was convicted, charges that he—

> Being then and there an assistant clerk or employee in or connected with the business or

> operations of the United States post-office in the city of Mobile, in the State of Alabama, did embezzle the sum of $1,652.59, money of the United States of the value of $1,652.59, the said money being the personal property of the United States (p. 2).

This count is under the act of March 3, 1875, ch. 144, § 1, making it punishable by imprisonment not over five years, or a fine of not over $5,000, or both, for *any person* to—

> Embezzle, steal, or purloin any money * * * of the United States.

STATEMENT OF FACTS.

The testimony tended to show that at various times various sums had come into his hands as assistant postmaster, which were not accounted for when he ceased to act as such on the date mentioned.

ARGUMENT.

We take up the assignments of error *seriatim:*

I, II. The indictment is claimed to have been demurrable. It is certainly very badly drawn. Are, however, the defects such as to bring it without the healing power of Rev. Stat., § 1025? If the defects are defects of form only, they are cured by the verdict, and can not be considered by this court, even though raised before the trial by demurrer. (*Connors* v. *United States*, 158 U. S., 408, 411.) The object of the section referred to was evidently to cut off all appellate jurisdiction over errors of form

and leave the responsibility as to these with the trial court alone, while the appellate court is to protect the rights guaranteed by the Sixth Amendment.

The meaning of the term "embezzle" is simple and familiar. As larceny at common law was construed to require an element of trespass, Parliament, instead of simply directing that this element should not be requisite, enacted substantially that a clerk or servant appropriating to his own use goods intrusted to him by his employer should be deemed guilty of larceny. The crime established by this and similar acts of Parliament and of our legislative bodies has become known as "embezzlement." (1 Bishop's New Criminal Law, § 567; 2 id., § 319 *et seq.*) It is distinguished from larceny only in the fact that the original taking of the property is not wrongful. (2 id., § 372.) In other words, it means the stealing of something which the thief had in his charge for the owner's benefit.

Hence it is not necessary in an indictment to describe the wrongful act with more particularity than by the simple word "embezzle," whose meaning is both clear and familiar. (2 Bishop on Criminal Procedure, § 322.)

This principle has been more than once recognized by the Supreme Court.

Thus, in discussing the sufficiency of an indictment in *United States* v. *Britton* (107 U. S., 655, 669), Mr. Justice Woods said:

> The words "willfully misapplied" are, so far as we know, new in statutes creating offenses, and they are not used in describing any offense at common law. They have no settled technical meaning like

> the word "embezzle," as used in the statutes, or the words "steal, take, and carry away," as used at common law. They do not, therefore, of themselves fully and clearly set forth every element of the offense charged.

In *United States* v. *Northway* (120 U. S., 327, 331), Mr. Justice Matthews said:

> In respect to those funds the charge against him is that he embezzled them by converting them to his own use. This we think fully and exactly describes the offense of embezzlement under the act by an officer and agent of the association.

It is respectfully submitted, however, that the words "by converting them to his own use" are mere tautology, and that, had they been omitted, the indictment would still have been sustained.

In *Batchelor* v. *United States* (156 U. S., 426, 429), Mr. Justice Gray said:

> By the settled rules of criminal pleading, and by the previous decisions of this court, the words "willfully misapplies," having no settled technical meaning (such as the word "embezzle" has in the statutes, or the words "steal, take, and carry away" have at common law), do not, of themselves, fully and clearly set forth every element necessary to constitute the offense intended to be punished.

In *United States* v. *Northway*, above cited, the count contained an express allegation "that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant by virtue of his office and character as president and agent." No such allegation is in this indictment. The omission is certainly negligent. Is it fatal?

Mr. Bishop states the necessary allegations in an indictment for embezzlement to be: "1. That the defendant stood in some fiduciary relation to another person named. * * * 2. That by virtue of such relation he received some specified thing of value for and on behalf of his master or employee, of a sort made by the statute a subject of embezzlement. 3. That he did embezzle the same, or some specified part thereof." Under some statutes, further allegations are necessary. (2 Bishop on Criminal Procedure, § 315.)

But is not the second requisite one "of form only, which shall not tend to the prejudice of the defendant," within the meaning of § 1025 of the Revised Statutes?

In *United States* v. *Jackson* (2 Fed. Rep., 502, 504) Judge Lowell says:

> It is somewhat difficult to say what is form and what is substance in an indictment. * * * Mere mistakes, however serious, in expressing the substance of a crime, if the meaning can be understood, I look upon as formal.

In *Babcock* v. *United States* (34 Fed. Rep., 873, 876) Mr. Justice Brewer applied it as follows:

> Can anything be clearer than that the defendant knew precisely what he was charged with, and that there was no doubt or uncertainty in the matter?

This seems to leave the word "substance" as substantially referring to the rights guaranteed by the Sixth Amendment "to be informed of the nature and cause of the accusation."

In this case the man's employment is said to be by the United States. The moneys belonged to the United

States. They were embezzled, which necessarily implies that they were confided to him to hold on behalf of the owner. Is there any doubt or uncertainty in the matter? Did he not know precisely what he was charged with? (See *United States* v. *Patterson*, 6 McLean, 466.)

The case of *United States* v. *Hess* (124 U. S., 483), largely relied upon by counsel for plaintiff in error, affords an excellent illustration of the kind of indictments to which § 1025 does not apply and whose omissions are incurable. That indictment simply alleged that defendant "devised a scheme to defraud divers other persons." It contained not the least information as to what fact was to be charged. The phrase "scheme to defraud" would apply equally well to a thousand plans totally different in nature.

That use recognizes that there are exceptions to the general rules laid down in the opinion and quoted by counsel for plaintiff in error. It is submitted that the word "embezzle," by its necessary implications, affords one of the exceptions.

So in *United States* v. *Cruikshank* (92 U. S., 542, 557) the unlawful intent charged was "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States and as citizens of said State of Louisiana." This gave no information of the crime which defendant was charged with. As remarked by the court, "There is no specification of any particular right. The language is broad enough to cover all."

The word "embezzled" implies an allegation that the moneys were in the hands of defendant to hold for the owner, and also an allegation that he converted them to his own use, *animo furandi*. The distinction between this case and those of Hess and Cruikshank is therefore fundamental.

The defendant complains that he is not charged with any felonious or criminal intent; but it is not a felony, and a criminal intent is implied in the word "embezzled." He complains that the moneys are not described with sufficient certainty; but this is without foundation. (*United States* v. *Bornemann*, 36 Fed. Rep., 257.) He complains that the moneys are not charged to have been in his possession. But that too is implied by the word "embezzled." He complains that they are not charged to have come into his possession by reason of his office or agency, or employment in the post-office. Be this so, yet if they be in his possession on behalf of the United States in any way whatever—and this is impliedly alleged—he is within the statute of 1875.

By the "supplemental demurrer" it is claimed that his employment is not stated with sufficient definiteness. Greater definiteness is not practicable in relation to these minor clerical positions in the Government service. They are not statutory offices and have no fixed legal titles. He knew whether he was an assistant clerk or employee. He is only alleged to have been employed in one capacity. This also is matter of form.

It is not necessary in an indictment to negative defenses or exceptions, as claimed in the motion in arrest

of judgment. (Wharton Crim. Pl. & Pr., § 238; 1 Bishop on Criminal Procedure, § 638; *Evans* v. *United States*, 153 U. S., 584, 593; *Stokes* v. *United States*, 157 U. S., 157, 191.)

Nor can a motion in arrest of judgment take the point that defendant is not assistant clerk but assistant postmaster; for the error, if any, does not appear upon "the face of the record." (1 Bishop on Criminal Procedure, § 1282.)

Nor is it necessary that the indictment should set forth evidence (*Stokes* v. *United States*, *supra*), especially when the details are first asked for in a motion in arrest of judgment.

III. It is assigned for error that the court denied a motion "to exclude the testimony of the witness Hancock." This motion was made after the testimony was all in. It was therefore discretionary. Defendant's remedy, if he desired to preserve the point for use upon a writ of error, was to move for the proper instruction to the jury.

It is respectfully submitted that these propositions are well settled. (1 Thompson on Trials, §§ 715, 716; *Pontius* v. *People*, 82 N. Y., 339, 347; *Gilmore* v. *Pittsburg R. R. Co.*, 104 Pa. St., 275, 281, 282; *McFarland* v. *Bellows*, 49 Mo., 311; *People* v. *Long*, 43 Cal., 444; *Brockett* v. *New Jersey Steamboat Co.*, 18 Fed. Rep., 156; *Wilcox* v. *Stephenson*, 30 Fla., 377, 386; *Gurley* v. *Park*, 135 Ind., 440; *Mo. Pac. Ry. Co.* v. *Lemathe*, 76 Tex., 219, 223; *Little Klamath Co.* v. *Reeta*, 39 Pac. Rep., 998.) To the contrary is only a remark, entirely *obiter*,

in *Benson* v. *United States* (146 U. S., 325, 333). It is submitted that a motion to strike out evidence is matter of right only when the evidence is admitted upon a promise to connect, which promise is not fulfilled. It is then to be stricken out because its admission was obtained by imposition on the court.

This motion "to exclude" is only an awkward form of a motion to strike out. If it were granted, the testimony would not actually be excluded. The jury do not read the minutes. What they have heard can not be excluded from their recollections. The right way to deal with evidence originally admitted, but shown by cross-examination to be irrelevant or incompetent, is to obtain full instructions to the jury at the end of the case, as above stated.

The evidence was, however, competent. (1 Greenleaf on Evidence, § 93.)

IV. It is claimed that the list of persons ordering special-request envelopes should have been excluded as hearsay and incompetent (pp. 13, 14). The list was competent because it was shown to defendant, who "made no comment upon or statement relative to" it, "except as to one item in said list, saying that that item was incorrect in amount" (p. 13). As it was shown him by his successor in office, who was trying to straighten out the accounts, it was plainly defendant's duty to assist him. The list, in conjunction with this testimony, ranks as an admission by silence. (1 Greenleaf on Evidence, § 197.) Any defect in the proof of this paper was cured (p. 15, foot).

V. The introduction of a draft for $400, drawn by the assistant postmaster at Pensacola, Fla., and cashed by defendant, was objected to on the ground that it did not appear from the paper that it was money-order funds and the drawer's authority was not shown. This was all clearly immaterial (p. 14), the moneys being moneys of the United States.

VI. This is a motion "to exclude." See IV, *supra*.

VII, VIII. These seem to require no discussion.

IX, X, XI, XII. These are motions "to exclude." See IV, *supra*. The only point which would need comment, were the objections properly taken, would be the objection to Merritt's testimony (p. 20), put on the ground that it related to the misappropriation of money-order funds (an objection somewhat inconsistent with V, *supra*). Embezzlement of money-order funds is specifically provided for in § 4046 of the Revised Statutes, upon which the second count of the indictment was based; but that count was not before the jury, having been held bad on demurrer.

The act of 1875, however, clearly covers the whole case, whether § 4046 may be regarded as affording a concurrent remedy, or as having been impliedly repealed by the later act, on the ground that Congress can not have intended to provide two different rules of punishment for the same offense. (*United States* v. *Tynen*, 11 Wall., 88, 93; but see act of March 3, 1883, ch. 123.) A special act is sometimes held repealed by a subsequent general act. (*Hubbard* v. *Soby*, 146 U. S., 56.)

XIII. This is a general exception to the whole charge, and needs no comment.

XIV. This is based, first, upon defendant's exception to the court's charge that if embezzlement were proved the jury must "assess a fine equal to the value of the money which was embezzled or converted" (p. 22). The learned trial judge had § 4046 in mind, although the count based on that statute was not before the jury. The jury did make such a finding, but the court, having evidently perceived its error, disregarded it in the sentence (p. 8). The finding was surplusage and, being harmless, is simply to be rejected. (*Stettler* v. *United States*, 157 U. S., 277, 279.) The court's direction was likewise harmless.

The other exception under this head seems to require no attention.

XV. This assignment brings up a series of requests to charge (p. 24).

The point that the act of 1875 can not apply to money-order funds has been already discussed.

The point that defendant "can not be convicted for the embezzlement of any part of the postal revenues" under this indictment is simply a repetition of the demurrer. The act of 1875, in its very narrowest construction, applies to all postal embezzlements not coming within either § 4046 or § 4053 of the Revised Statutes. The latter section can not apply to embezzlements by an assistant postmaster, whose duty is to deliver moneys to the postmaster, not to deposit them in the Treasury.

The court had fully charged as to reasonable doubt. No demand is necessary to be proved.

The key deposit fund has nothing to do with the act of February 3, 1879, ch. 42. That statute relates only to internal revenue.

XVI. The motion in arrest of judgment has already been considered in connection with the demurrers.

XVII. There is no error in the judgment, the sentence being within the act of 1875, and properly disregarding the surplusage in the verdict. It is therefore unnecessary to discuss the somewhat peculiar case of *Woodruff* v. *United States*. (58 Fed. Rep., 766.)

Respectfully submitted.

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